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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-415

PORTLAND CEMENT ASSOCIATION
An Illinois Not-For-Profit Corporation

Petitioner

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

Respondent

MEDUSA CORPORATION
NORTHWESTERN STATES PORTLAND CEMENT CO.

Intervenors

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERVENOR'S PETITION FOR REHEARING

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Intervenor NORTHWESTERN STATES PORTLAND CEMENT CO. respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari entered on December 8, 1975 and (2) granting the Petition. This Petition, in accordance with Rule 58(2) is based on substantial grounds which were available to Petitioner PORTLAND CEMENT ASSOCIATION but have not previously been presented to this Court. In support of this motion Intervenor-Petitioner states the following:

1. THE CONFLICT

In this case two of the tests on which the cement standards were based were found to be inadequate to support the standard's validity and no opportunity was provided for comment on the remaining five tests. The standards were, nevertheless, upheld. Thus the decision below directly conflicts with the decisions of this Court in *Camp* v. *Pitts,* 411 U.S. 138(1973), and the U.S. Court of Appeals for the Sixth Circuit in *Buckeye Power* v. *EPA,* 481 F2d 162(1973) and *Detroit Edison Co.* v. *EPA,* 496 F2d 244 (1974) and with section 706 of the Administrative Procedure Act which require a reviewing court to *vacate* a regulation where the administrative record is inadequate or there is a failure to comply with procedural requirements of rule making.

2. THE FIRST TWO TESTS

Section 111 of the Clean Air Act requires the Administrator to determine that "the degree of emission limitation" required by a standard "has been adequately demonstrated". (Pet.App. A-109) Here, the Administrator relied on two performance tests at cement plants to demonstrate the achievability of the standards as originally promulgated. (Pet.App. A-5) These tests were found inadequate for a number of reasons when the court below first heard the Petition for review. (Pet.App. A-33ff)

On one specific point the court said:

> "The cement manufacturers point, in this regard, to the absence of continuous sampling in the EPA data, since the "longest elapsed time of any sampling episode was 30 minutes", whereas under the regulations promulgated, conformity is to be measured on the basis of maximum 2-hour averages. *It is incumbent on the Administrator to explain the discrepancy.*" (Pet.App. A-48) (Emphasis supplied)

The Agency's remand response did *not* "explain this discrepancy". Thus, the inadequacy of the administrative record was not cured. Nevertheless, the Court held the standards valid despite the rule established by this Court that if the Administrator's conclusion "is not sustainable on the administrative record made, then the . . . decision must be vacated . . ." *Camp* v. *Pitts,* 411 U.S. at 143

3. THE FIVE REMAINING TESTS

During remand the Administrator submitted the results of five additional tests as a basis for the standards. He did *not* permit an opportunity for comment on these tests. The decision below notes this deficiency specifically. (Pet. App. A-5) The opportunity to comment on such material is *vital* to the informal rule making process. The Administrative Procedure Act provides:

> "After notice required by this section, the Agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . ." (5 USC § 553(c); Pet. App. A-67)

This requirement has been underscored, relied upon, referred to and required in many decisions of this Court. *Morgan* v. *U.S.,* 304 U.S. 1 at 18-19(1938); *U.S.* v. *Allegeheny-Ludlum Steel Corp.,* 406 U.S. 742(1972); *U.S.* v. *Fla. E. Coast R Co.,* 410 U.S. 224(1973); *I.C.C.* v. *Ore. Pac. Ind., Inc.,* 420 U.S at 193(1974); see also *The Judicial Role in Defining Procedural Requirements for Agency Rule Making,* 87 Harv L. Rev. 782(1974)

Failure to provide such opportunity *requires* a reviewing court to set the regulation aside. The Administrative Procedure Act provides:

> "The reviewing court *shall*—
>
> • • •
>
> (2) Hold unlawful and set aside Agency action, findings, and conclusions found to be—
>
> • • •
>
> (D) Without observance of procedure required by law;" (5 USC § 706; Pet.App. A-108) (Emphasis supplied)

These principles were recognized by the court below in its 1973 decision when it said:

> "We find a critical defect in the decision-making process in arriving at the standard under review in the initial inability of petitioners to obtain—in timely fashion—the test results and procedures used on existing plants which formed a partial basis for the emission control level adopted, and in the subsequent seeming refusal of the agency to respond to what seem to be legitimate problems with the methodology of these tests." (Pet.App. A-37, 38)

The same "critical defect" applied to the five additional tests submitted upon remand and the court below noted this specifically in its final opinion. (Pet.App. A-5) Nevertheless, it validated the Administrator's determination based on these test results. This action is in direct conflict with Sixth Circuit decisions which vacated EPA actions when the opportunity for comment was not afforded and the rule making requirements of the Administrative Procedure Act were not followed. *Buckeye Power* v. *EPA, supra* at 170, 174; *Detroit Edison Co.* v. *EPA, supra* at 249.

4. THE QUALITY OF THE JUDICIAL REVIEW

Contrary to the facts and considerations related above *as found by the court itself,* the court below stated that the remand response was adequate. That unexplained, unfounded and irrational conclusion mocks the requirement set down by this Court that administrative regulations must receive a "thorough, probing, in-depth review" by the reviewing court. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415 (1971).

CONCLUSION

For the reasons set forth above, as well as those set forth in the Petition for Writ of Certiorari, Intervenor NORTHWESTERN STATES PORTLAND CEMENT CO. prays that this Court grant rehearing of the order of denial, vacate that order, grant the Petition and review the judgment and opinion below.

Respectfully submitted,

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HAROLD R. WINSTON
Counsel for Intervenors-Petitioner

CERTIFICATE OF COUNSEL

As counsel for Intervenor-Petitioner we certify that this petition for rehearing is restricted to the grounds specified in Rule 58(2); and presented in good faith and not for delay, Intervenor's principal counsel having been unable, as a sole practitioner overburdened with his duties as President of the Iowa State Bar Association, to address himself to these matters at an earlier date.

ROBERT H. SHEPARD
HAROLD R. WINSTON
Counsel for Intervenors-Petitioner

December 29, 1975